Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
National Cable and Telecommunications Association	)	WC Docket No. WC 11-118
	)	
	)	
Petitions Regarding Section 652 Of the Communications Act	)	
	)	
	)	

REPLY COMMENTS OF
XO COMMUNICATIONS, LLC

Introduction

XO Communications, LLC ("XO"), by its attorneys, hereby submits its reply to the initial comments filed on the petition for declaratory ruling ("PDR") and the conditional petition for forbearance ("Forbearance Petition;" with the PDR, the "Petitions") of the National Cable and Telecommunications Association ("NCTA") concerning Section 652 of the Communications Act, as amended (the "Act").[1] In the Petitions, NCTA asks the Commission to determine that Section 652 does not apply to mergers and acquisitions between competitive local exchange carriers ("CLECs") and cable operators. As a CLEC, XO provides communications services domestically and internationally over extensive wireline and wireless facilities it owns directly and leases either on a short or long-term basis.

As discussed herein, XO supports grant of the Petitions. Mergers and acquisitions between CLECs and cable companies promote facilities-based competition in the provision of local services. As such, CLEC-cable company alliances serve the public interest and are

[1] *See Comment Sought on NCTA Petitions Regarding Section 652 of the Communications Act, Pleading Cycle Established*, Docket No. WC 11-118, Public Notice DA 11-1177, rel. July 8, 2011.

consistent with the intent of Congress in adopting Section 652. Since the Petitions satisfy the applicable legal criteria for grant, the Commission should grant them.

A Determination That Section 652 Does Not Apply to CLEC/Cable Company Transactions Serves the Public Interest.

In its PDR, NCTA asks that the Commission issue a ruling to clarify that Section 652 of the Act does not apply to transactions between CLECs and cable operators.[2] In the alternative, NCTA requests in its Forbearance Petition that the FCC forbear from enforcing Section 652 of the Act to mergers, acquisitions, and other transactions between CLECs and cable operators.[3] As many commenters in this proceeding have recognized, restricting the applicability of Section 652 as proposed by NCTA would serve the public interest.[4]

In many respects, CLECs and cable companies are complementary businesses. CLECs have traditionally focused on providing telecommunications services to business customers in competition with dominant incumbent local exchange carriers ("ILECs"). CLECs have developed extensive operational, marketing, and technical expertise to serve these customers. In contrast, cable operators have typically concentrated on the consumer/residential market and have less experience serving business customers. Most notably, the networks of cable operators

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2 PDR at 1.

3 Forbearance Petition at 1.

4 *See, e.g.*, Comments of American Cable Association, WC Docket No. 11-118, Aug. 22, 2011 ("ACA Comments"); Comments of Citizens Against Government Waste, WC Docket No. 11-118, Aug. 22, 2011 ("CAGW Comments"); Comments of Comcast Corporation, WC Docket No. 11-118, Aug. 22, 2011 ("Comcast Comments"); Comments of COMPTEL, WC Docket No. 11-118, Aug. 22, 2011 ("COMPTEL Comments"); Comments of Digital Liberty, WC Docket No. 11-118, Aug. 22, 2011 ("Digital Liberty Comments"); Comments of the Institute for Policy Innovation, WC Docket No. 11-118, Aug. 22, 2011 ("IPI Comments"); Comments of National Taxpayers Union, WC Docket No. 11-118, Aug. 22, 2011 ("NTU Comments"); Comments of Precursor LLC, WC Docket No. 11-118, Aug. 22, 2011 ("Precursor Comments"); Comments of U.S. TelePacific Corp., Access Point, Inc., First Communications, Inc. and Broadview Networks, Inc., WC Docket No. 11-118, Aug. 22, 2011 ("CLEC Group Comments").

frequently do not serve the premises of larger business customers. Because of these complementary capabilities, alliances between CLECs and cable companies can lead to the expansion of cable services throughout business districts and the migration of CLEC services from leased to owned facilities. Such alliances can promote greater facilities-based competition with ILECs and other providers, putting downward pressure on rates, increasing the offering of innovative services, and enhancing service quality.

Yet there have been few CLEC-cable buyouts in recent years. The costs and burdens of complying with Section 652, as illustrated by *CIMCO*[5] and *NTELOS*[6] and discussed in various comments,[7] discourage CLECs and cable companies from forming alliances. As CAGW noted with irony in its comments, as CLECs continue to fail, it is the application of Section 652 restrictions to CLEC-cable transactions that prevents competition in the local phone services marketplace.[8] Limiting the application of Section 652 to transactions between ILECs and cable companies will eliminate the uncertainty created by *CIMCO* and *NTELOS* and will encourage CLEC-cable company transactions, to the ultimate benefit of American consumers and businesses.

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5 *Applications Filed For the Acquisition of Certain Assets of CIMCO Communications, Inc. by Comcast Phone LLC, Comcast Phone of Michigan, LLC and Comcast Business Communications, LLC, Memorandum Opinion and Order and Order on Reconsiderations,* WC Docket No. 09-183, 25 FCC Rcd 3401 (2010) ("*CIMCO*").

6 *Applications Granted For the Transfer of Control of FiberNet from One Communications Corp. to NTELOS Inc*., WC Docket No. 10-158, Public Notice DA 10-2252, rel. Nov. 29. 2010 ("*NTELOS*").

7 *See, e.g.*, ACA Comments at ; Comcast Comments at 7-8; COMPTEL Comments at 8-10.

8 CAGW Comments at 1.

A Determination That Section 652 Does Not Apply to CLEC/Cable Company Transactions is Consistent With the Intent of Congress and Does Not Compromise the Rights of Third Parties.

Interpreting Section 652 to apply only to transactions between ILECs and cable companies is consistent with the history and underlying purpose of this section of the Act. As many commenters noted, Congress's intention in adopting Section 652 was to prevent one entity from gaining sole control over last-mile facilities to the home as competition emerged in the market for local phone services.[9] Concerns about the preservation of facilities-based competition are not implicated by mergers between cable companies and CLECs. Furthermore, interpreting Section 652 as applicable only to ILEC-cable company mergers is strongly supported by the definition of "telephone service area" in Section 652(e) – "the area in which [the] carrier provided telephone exchange service as of January 1, 1993."[10] Because CLECs were not able to obtain interconnection agreements with ILECs as required to provide local phone service until the 1996 Act was passed, it is highly unlikely that any CLEC was providing local exchange service in a "telephone exchange area" on January 1, 1993.[11]

Commenters who object to the relief NCTA requests in its Petitions argue that limiting the application of Section 652 to ILEC-cable company arrangements will compromise the rights of local franchise authorities ("LFAs") and other interested parties vis-à-vis CLEC-cable company mergers.[12] Such comments ignore the fact that CLEC-cable company transactions will continue to be subject to the Commission's approval processes for transfers of control and

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9 *See, e.g.*, CAGW Comments at 1; CLEC Group Comments at 4-5; Comcast Comments at 3-4; NTU Comments at 2.

10 47 U.S.C. § 572(e).

11 *See* Comcast Comments at 2; COMPTEL Comments at 3, 5-6.

12 *See* Comments of the National Association of Telecommunications Officers and Advisors, WC Docket No. 11-118, Aug. 22, 2011, at 5-6 ("NATOA Comments"); Comments of Public Knowledge, WC Docket No. 11-118, Aug. 22, 2011, at 2-3 ("Public Knowledge Comments").

assignment of assets, as well as the approval processes of the U.S. Department of Justice, the Federal Trade Commission, state public utility commissions, and/or state attorneys general, as appropriate.[13] Interested parties, including potentially affected LFAs, will still have notice of the proposed transaction and an opportunity to object. However, LFAs will no longer have unlimited power to veto a CLEC-cable company alliance on the grounds of contractual or other disputes that have no bearing on the proposed merger or acquisition.

The Petitions Satisfy the Applicable Legal Standards for Approval.

Finally, as various parties demonstrate in their comments, the PDR and the Forbearance Petition each satisfy the applicable legal criteria for grant.[14]

The Commission issues declaratory rulings to clarify ambiguous provisions of the Act or the FCC rules.[15] Section 652 is inherently ambiguous. As written, Section 652(b) prohibits a cable company from acquiring a CLEC without a waiver if the CLEC provides telephone exchange service in the cable company's franchise area. At the same time, however, Section 652(a) would permit the same CLEC to acquire the same cable company without a waiver, despite the fact that both transactions would have the same competitive effect. Section 652(a) prohibits CLECs from acquiring cable companies only when the cable company provides cable service within the CLEC's "telephone service area," and as discussed above, this term effectively

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13 CLEC Group Comments at 6; IPI Comments at 3.

14 *See* ACA Comments at 7-9; COMPTEL Comments at 10-11; CLEC Group Comments at 5-7.

15 *See Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances That Classify All Wireless Siting Proposals as Requiring a Variance, Declaratory Ruling*, 24 FCC Rcd 13994 (2009).

excludes most if not all CLECs. A declaration that Section 652 does not apply to transactions between cable companies and CLECs would eliminate this "asymmetry."[16]

Similarly, the Forbearance Petition satisfies the criteria for grant of forbearance requests as set forth in Section 10(a) of the Act. Since CLECs and cable operators are non-dominant providers of telecommunications services, the cable/LEC buyout restrictions of Section 652 are not necessary to ensure that rates, terms and conditions for the provision of telecommunications services by CLECs are just, reasonable, and not unjustly or unreasonably discriminatory, or to protect consumers. And as discussed previously, forbearance from the application of Section 652 to CLEC/cable company transactions is consistent with the public interest, since mergers between CLECs and cable companies promote facilities-based competition in the provision of local services.

16 *See* Comcast Comments at 2-3.

Conclusion

Since the public interest would be served by restricting the applicability of Section 652 as proposed by NCTA and the Petitions satisfy the applicable legal standards, the Commission should grant the Petitions and thereby determine that Section 652 of the Act does not apply to mergers and acquisitions between CLECs and cable companies.

Respectfully submitted,

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